Office of the Saskatchewan Information and Privacy Commissioner
Submission to
Workers' Compensation Board Review Committee

SUMMARY OF RECOMMENDATIONS

The Saskatchewan Information and Privacy Commissioner recommends to the Committee the following:

1) **There should be a full-time access and privacy coordinator/officer with direct access to the Board similar to the Fair Practices Officer.**

2) ***The Workers' Compensation Act, 1979*** **(WCA) should be clarified to confirm that claimants are entitled to request that the Information and Privacy Commissioner address a complaint that a claimant has been denied access to the personal information/personal health information in their claims file.**

3) **The WCA should be clarified to ensure that claimants do not forfeit their right to take complaints to the Information and Privacy Commissioner with respect to inappropriate or unlawful collection, use or disclosure of their personal information/personal health information.**

4) **Although it is not necessary to amend sections 171.1 and 171.2 of the WCA, there would be value in clarification and guidance for situations where the employer seeks disclosure of the injured worker's personal information/personal health information. The purpose would be to limit disclosure to personal information or personal health information necessary and relevant for purposes of the particular claim.**

5) **Clarify a simple procedure for injured workers and employers with respect to access to personal information or personal health information in injured workers' files. This simple procedure should guarantee workers that their right to access personal information/personal health information about them will be consistently respected.**

6) **Reconsider the Workers' Compensation Board's exemption from Parts II, IV and V of** ***The Health Information Protection Act.***

OUR AUTHORITY

Our authority for making recommendations is found in *The Freedom of Information and Protection of Privacy Act* (the FOIP Act), and more particularly in section 33 as follows:

> *33. The commissioner may:*

(a) offer comment on the implications for privacy protection of proposed legislative schemes or government programs;
(b) after hearing the head, recommend that a government institution:
(i) cease or modify a specified practice of collecting, using or disclosing information that contravenes this Act; and
(ii) destroy collections of personal information that is collected in contravention of this Act;
(c) in appropriate circumstances, authorize the collection of personal information in a manner other than directly from the individual to whom it relates;
(d) from time to time, carry out investigations with respect to personal information in the possession or under the control of government institutions to ensure compliance with this Part.

Furthermore, the general powers of the commissioner are described as follows:

45. The commissioner may:
(a) engage in or commission research into matters affecting the carrying out of the purposes of this Act;
(b) conduct public education programs and provide information concerning this Act and the commissioner's role and activities;
(c) receive representations concerning the operation of this Act.

IDENTIFIED ISSUES WITH WCB

Last year our office received more than 1330 requests for assistance from Saskatchewan residents. We receive each year more than 100 formal requests for review of a decision of a government institution or local authority to deny access to information or for complaints about an improper collection, use or disclosure of an individual's personal information or personal health information.

Our office receives a significant number of requests for review and complaints involving the Workers' Compensation Board (WCB): 20 WCB related files have been opened since July, 2003. We also receive numerous inquiries about WCB which do not result in a file being opened.

The complaints and concerns include the following:

- WCB demands personal health information (phi) that is not relevant to the compensable injury;
- WCB shares more information about an injury with the employer than necessary;
- WCB shares irrelevant personal information/personal health information with the employer;
- Employers are given easy access to claim files, but injured workers are denied access to their own personal information/personal health information;
- WCB does not let claimants see their own case management files unless and until an appealable issue has been identified, and even then may not allow the claimant to view their entire file;
- Inconsistency between legislative requirements and WCB policies and procedures such as the need for an appealable issue to view any portion of the file.

We are also concerned about the WCB's position that the Office of the Saskatchewan Information and Privacy Commissioner (OIPC) does not have the jurisdiction to review case management files.

BACKGROUND

(a) *The Freedom of Information and Protection of Privacy Act*

Saskatchewan residents enjoy the right to access information about themselves held in government data banks, and limits on the government's ability to collect, use and disclose such information. These rights are defined in the FOIP Act. The FOIP Act has been in force since 1992.

The FOIP Act governs bodies described as "government institutions"[1]. This would include all provincial government departments, agencies and boards including the WCB.

Fundamental to the FOIP Act is the right of appeal to an independent Information and Privacy Commissioner who reports to the Legislative Assembly and not to the Government[2]. The Commissioner oversees the activities of the various public bodies in terms of compliance with the FOIP Act.

The FOIP Act has an expansive definition of "personal information"[3]. It is likely that at least some of the information routinely collected, used and disclosed under the WCA will include personal information as defined by the FOIP Act. The FOIP Act has specific provisions for collection, use and disclosure of personal information. Personal information can be used and disclosed under the FOIP Act without consent for the purpose for which the information was obtained or compiled by the public body or for a use that is consistent with that purpose[4]. The FOIP Act enumerates more than twenty circumstances when personal information can be disclosed without consent[5]. The FOIP Act permits an individual to obtain access to their own information[6] and to request that errors be corrected[7].

The FOIP Act is similar to the federal *Access to Information Act*[8] and the federal *Privacy Act*[9].

Former Supreme Court Justice Gerard v. LaForest recently issued his report as special advisor to the federal Minister of Justice – *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues.* He stated that:

> *"The Access to Information Act gives the individuals a right of access to government information. The Privacy Act permits them to gain access to information about themselves held in government data banks, and limits government's ability to collect, use and disclose such information...*
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> ***The rights protected by both Acts are of the highest importance in the functioning of a modern democratic state...So important is the right to government information that some have come to refer to it as "quasi-constitutional" in nature...*** (emphasis added)

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[1] FOIP Act, s. 2(1)(d)
[2] FOIP Act, s. 49; LA FOIP Act, s. 38
[3] FOIP Act, s. 2(1)(g) and 24; LA FOIP Act, s. 2(h) and 23
[4] FOIP Act, s. 28, 29(2)(a); LA FOIP Act, s. 27, 28(2)(a)
[5] FOIP s. 29(2) and Reg. s. 14-17; LA FOIP Act, s. 28(2) and Reg. s. 9,10
[6] FOIP Act, s. 30; LA FOIP Act, s. 30
[7] FOIP Act, s. 31; LA FOIP Act, s. 31
[8] *Access to Information Act*, R.S. 1985, c. A-1
[9] *Privacy Act*, R.S. 1985, c. P-21

[See Nautical Data International Inc. v. Canada (Minister of Fisheries and Oceans), 2005 FC 407 at para.8; Canada (Attorney General) v. Canada (Information Commissioner), [2004] 4 F.C.R. 181 at para. 20, 255 F.T.R. 56, 15 Admin. L.R. (4th) 58, 32, C.P.R. (4th) 464, 117 C.P.R. (2d) 85, 2004 F.C. 431, rev'd (2005), 253 D.R.R. (4th) 590, 335 N.R. 8, 40 C.P.R. (4th) 97, 2005 FCA 199, leave to appeal to S.C.C. requested; Canada (Attorney General) v. Canada (Information Commissioner), [2002] 3 F.C. 630 at para. 20, 216 F.T.R. 247, 41 Admin. L.R. (3d) 237, 2002 FCT 128, 3430901 Canada Inc. v. Canada (Minister of Industry), [2002] 1 F.C. 421 at para. 102, (2001), 282 N.R. 284, 45 Admin L. R. (3d) 182, (2001) 14 C.P.R. (4th) 449, 2001 FCA 254, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 537 (Q.L.)]

The courts have also described the Privacy Act as carrying a "quasi-constitutional mission". (emphasis added)

[Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, (2002) SCC 53 at para 25; R. v. Dyment, [1988] 2 S.C.R. 417; R. v. Mills, [1999] 3 S.C.R. 668; Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 402; R. v. Plant, [1993] 3 S.C.R. 281; R. v. Duarte, [1990] 1 S.C.R. 30; R. v. Edward, [1996] 1 S.C.R. 128; Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), [2003] 1 S.C.R. 66, 2003 SCC 8.]

In Saskatchewan, the importance of the FOIP Act is affirmed by paramountcy provisions that ensure that in the event there is a conflict, unless otherwise stated by the Assembly, the FOIP Act will prevail[10].

(b) ***The Health Information Protection Act***

Since September 1, 2003, HIPA has been in force in Saskatchewan. It applies to health information "trustees"[11] that have in their custody or control "personal health information"[12]. The list of trustees captures every government department including the Saskatchewan WCB, every regional health authority and health professionals such as physicians and psychologists in their private offices and clinics. HIPA sets out the rules for the collection, use and disclosure of personal health information[13]. Personal health information can be thought of a subset of "personal information". It includes information with respect to the physical or mental health of an individual; information with respect to the health service provided to the individual; registration information and information collected in the course of providing health services to someone.

Clearly, much of the information collected, used or disclosed under HIPA will qualify as personal health information. When the personal health information is in the custody or control of a government department, the applicable law will be HIPA and not the FOIP Act.

HIPA permits a great deal of use and disclosure of personal health information among persons and bodies involved in providing diagnosis, treatment and care to an individual without any requirement for consent of the individual.[14] All uses and disclosures are subject to a set of general rules which must be met before the use and disclosure provisions can be relied upon. These general rules include sections 9 (Right to be informed), 10 (Right to information about disclosures without consent), 16 (Duty to

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[10] FOIP Act, s. 23; LA FOIP Act, s. 22
[11] HIPA, s. 2(t)
[12] HIPA, s. 2(m)
[13] HIPA, Part III & Part IV
[14] HIPA, s.26-30

protect), 19 (Duty to collect accurate information), and 23 (Collection, use and disclosure on need-to-know basis).

As with the FOIP Act, there is a right of appeal to an independent Information and Privacy Commissioner[15]. The Commissioner also has broad powers to oversee the activities of trustees in terms of HIPA compliance[16].

(c) ***Application of Access and Privacy Legislation across Canada***

In every jurisdiction across Canada except the Yukon, the provincial workers' compensation scheme is subject to oversight by the provincial Office of the Information and Privacy Commissioner. Each provincial OIPC office has advised us that their compensation board works closely with the OIPC to resolve access requests and breach of privacy complaints.

In discussing the situation in the Yukon, the Ombudsman who oversees the provincial access and privacy legislation advised that the compensation board was completely excluded, but that that was not the intent of the legislature. Mr. Moorlag wrote:

> *"The problem is with the definition of a 'public body' in our ATIPP Act. The definition includes para. (a) covering ministries of government, and para. (b) covering boards, commissions, foundations, corporations, etc., "established or incorporated as an agent of the Government of the Yukon" [emphasis mine]. It is in the phrase, 'agent of the government of the Yukon' that creates the difficulty. In a 2000 review of a decision by the Yukon Medical Council (YMC) to refuse access, the definition was challenged. As a threshold issue in the review, I determined the YMC to be an agent of the government. On appeal, the Yukon Supreme Court agreed, but on appeal to the Yukon Court of Appeal it was overturned. The reasoning of the Court of Appeal was that the primary function of the YMC – to make decisions about who gets to practice medicine in the Territory, and decisions on matters related to complaints of professional misconduct – is, by its enabling legislation, free of government direction or control. Therefore, it is not an agent of government, and not a public body under the ATIPP Act. Applying this reasoning to similar bodies, essentially eliminates paragraph (b), including the YWCHSB* [Yukon Workers' Compensation Health & Safety Board]. *As I said in my 2004 Annual Report[17], at page 19:*
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> > *Because the Act specifically includes, in paragraph (b) of the definition of a 'public body' boards, commissions and other agencies, the legislature could not possibly have intended to render paragraph (b) meaningless with the qualifier that they be an agent of the Government of the Yukon. Using the Court's interpretation, these agencies are at once included and excluded in the same sentence, creating an oxymoron — conjoining contradictory terms.*
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> *Since then, the government has begun a review of the Workers' Compensation Act. As part of the review, I have made a submission that the Act be amended to include the YWCHSB as a 'public body' under the Act, notwithstanding its status as an agent of government.*

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[15] HIPA, s. 42; 14
[16] HIPA, s. 52(d)
[17] Available at http://www.ombudsman.yk.ca/pdf/2004%20Report%20Eng.pdf

I have also called for an amendment to the ATIPP Act on the definition of a 'public body' to bring clarity. My recommendation includes setting out the public bodies under para. (b) in a Schedule by regulation, as in the Alberta FOIPP Act."

Mr. Moorlag further advised the following:

"Following the Court of Appeal decision, the YWCHSB decided to bring in its own policy for information access and privacy protection. The policy requires the Board to apply the ATIPP Act, including the procedures for access to information requests. The review mechanism is a panel made up of members of the Board of Directors that would follow the same procedures as the Commissioner under the ATIPP Act.

I have expressed the view to the Workers' Compensation Act review committee that this policy, intended as an interim measure pending amendments to the ATIPP Act, is seriously flawed. The policy cannot confer on the review panel the same powers given the Commissioner under the Act. But, the most serious problem is that the review mechanism is not independent."

It is most interesting to note that while the Yukon compensation board is not *required* to comply with the access and privacy legislation, the board has chosen to do so until such time as this anomaly can be addressed in the legislature.

ANALYSIS

Application of the FOIP Act and HIPA to the Saskatchewan Workers' Compensation Board

General Application

Section 3 of the Regulations for the FOIP Act states that the prescribed board, commission, Crown corporation or other body included as a "government institution" are set out in Part I of the Appendix. The Appendix specifically lists WCB as a government institution subject to the provisions of the FOIP Act. Accordingly, WCB is also a trustee subject to the provisions of HIPA.

Specific Application of Legislation to the WCB

Application of HIPA:

Paragraph 4(4)(h) of HIPA states:

"*Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of: ... The Workers' Compensation Act, 1979*; ..."

Subsection 4(6) states:

"*The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.*"

This section operates to completely exclude *The Workers' Compensation Act, 1979* from the application of Parts II (Rights of the Individual), IV (Limits on collection, Use and Disclosure of Personal Health Information by Trustees) and V (Access of Individuals to Personal Health Information) of HIPA. However, the Board remains subject to Parts III (Duty of Trustee to Protect Personal Health Information), VI (Review and Appeal), VII (Commissioner), and VIII (General).

Subsection 4(6) of HIPA operates to ensure that the FOIP Act applies to an act exempted under subsection 4(4) unless it is further exempted from the FOIP Act. Therefore, the FOIP Act applies where HIPA does not unless exempted under section 23 of the FOIP Act.

Section 19 of HIPA, to which WCB is subject, imposes a positive duty on trustees:

> *"In collecting personal health information, a trustee must take reasonable steps to ensure that the information is accurate and complete."*

The most reasonable and least complicated method to ensure accurate and complete information is to allow the injured worker to review his file and indicate if corrections or amendments are required. Further, section 47 in Part VI imposes the onus on the trustee "*to prove that the individual has no right of access to the records*". The WCB has provided no substantive reason to support their position that injured workers are not entitled to see their individual claim files. WCB has only provided reference to its policies in support of the position that an appeal is required prior to the injured worker viewing any portion of the claim file.

Application of the FOIP Act:

WCB is a government department to which the FOIP Act applies. However, section 23 of the FOIP Act, a primacy clause, applies in this instance. Subsections 23(1) and (2) combine to, in effect, ensure that the FOIP Act would prevail over other primacy clauses unless the records fall within the enumerated list of exemptions in subsection 23(3) of the FOIP Act or another Act's primacy clause specifically addresses the FOIP Act so as to exclude that act or parts of that act from application of the FOIP Act. Paragraph 23(3)(k), the FOIP Act, appears to exclude sections 171 to 171.2 of WCA from application of the FOIP Act.

Sections 171.1 and 171.2 address accessing information during the appeal process. These sections guarantee access to information "respecting the worker for the purposes of this Act" if an appeal is involved. WCB has indicated that this means only the information related to the appeal would be disclosed.

Paramountcy

<u>Sections 171.1 and 171.2 of the WCA:</u>

The FOIP Act does not apply to disclosure for appeal purposes under s. 171.1 and 171.2 as the requirements limiting access to information in s. 171.2 would conflict with the FOIP Act. However, the employer does not require, and should not have, access to all the information in the case file.

Since the FOIP Act's provisions regarding protection of personal information would conflict with the employer's ability to participate fully in the appeal process, the s. 171.2 access provision of WCA would be paramount. The employer perspective is thoroughly analyzed in BC Investigation Report P96-006.

This is relevant as the BC legislation parallels the Saskatchewan WCA. In the event of a conflict and in accordance with the FOIP Act, s. 23(3), the WCA appeal provisions would prevail.

Section 171 of the WCA:

Although there is no doubt about the paramountcy of WCA s. 171-171.2 over the FOIP Act, paramountcy only applies when there is a true conflict between legislation. It is our contention, as supported by British Columbia case law, that no such conflict actually exists between s. 171 and the FOIP Act. As such, paramountcy would not be invoked and the relevant sections of the FOIP Act would apply.

Section 171 of the WCA reads:

> ***171****(1) Subject to sections 171.1 and 171.2, no officer of the board and no person authorized to make an inspection or inquiry under this Act shall divulge or allow to be divulged, except in the performance of his duties or under the authority of the board, any information obtained by him or that has come to his knowledge in connection with that inspection or inquiry.*
> *(2) Every person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $1,000.*

In Saskatchewan, the importance of access and privacy legislation is affirmed by primacy provisions that assert that, unless otherwise stated by the legislators, the access and privacy legislation will prevail in a conflict with other statutes. This primacy clause ensures that the fundamental rights enshrined in the access and privacy legislation are given proper deference when interpreting legislative intent as to its application in conjunction with other statutes. A primacy clause is a strong expression of legislative intent and a tool for ensuring public policy objectives are met. In the event of a contest between two statutes, the legislature is presumed to not intend conflict between the statutes. Therefore, if an interpretation allows a concurrent application, that interpretation should be adopted.

In the event of a conflict or inconsistency between two valid provincial statutes, a legislative paramountcy analysis would be required.

Conflict or Inconsistency:

There are three tests used to determine whether the two laws can coexist or are inconsistent or in conflict. While these tests were developed in relation to federal paramountcy, the same analysis applies to determination of conflict or inconsistency between two provincial enactments.

(1) The first test is that of pure conflict. Does compliance with one law involve the breach of the other?
(2) The second test is whether one law is supplemental to the other by adding something to the regulation of workers' compensation claims. If the one law is "supplemental," then it will be valid concurrently with the other law.
(3) The third test involves whether one law duplicates another such that there is not an actual conflict or contradiction. Mere duplication without actual conflict or contradiction is normally not sufficient to invalidate a law. It would simply mean that the Board would be held to the higher standard of the competing statutes.

An analysis of each of these three tests follows.

(1) Is there pure conflict between the FOIP Act and the WCA?

We need to determine whether a "conflict" or an "inconsistency" exists between the provisions of the FOIP Act and sections 171 to 171.2 of the WCA. In an analysis of the obligations under the WCA, there is no conflict or inconsistency with the requirements of the FOIP Act. Section 171 affirms the duty to not disclose personal information outside the need to know purview of managing the case file. This is further delineated in the appeal process identified in s. 171.1 and 171.2. In fact it seems apparent that the FOIP Act codifies the high standards of procedural fairness and natural justice as well as the common law fiduciary duties required of the WCB.

The first step would require determination of who holds the records, in this instance WCB. The next test would be whether a conflict or inconsistency exists. This would entail a thorough examination of the relevant legislation to determine whether the records are subject to the access and privacy legislation or are exempted by a primacy clause. If the record is excluded from access and privacy legislation, there is no jurisdiction to process the request or review the decision respecting access to the record. If the record is subject to access and privacy legislation, but exempted under a primacy clause, determine whether the access and privacy legislation and the other statutes that apply to the records have conflicting obligations. If the statutes are complementary, they can coexist and the records would be subject to the highest standard. In fact, in Saskatchewan s. 4 of the FOIP Act expressly states that the FOIP Act "complements and does not replace existing procedures for access to government information or records" and "does not in any way limit access" to records that are normally available. The FOIP Act operates to ensure that access is provided where it did not previously.

Under the FOIP Act section 23, the FOIP Act prevails over another act that conflicts with the FOIP Act. This paramountcy provision does not apply to s. 171 to 171.2 of the WCA. Section 23(3) is slightly different from other jurisdictions in that s. 23(1) "does not apply" to the acts listed. Those listed Acts are not included in the "in the event of a conflict or inconsistency" provision. Alberta reads that the FOIP Act applies unless expressly provided that the other Act "prevails". WCB may argue that s. 23(3) is exclusionary; therefore, the FOIP Act does not apply prima facie to access during appeals or case management files generally. However, s. 23(3) merely states that s. 23(1) does not apply to prevail in the event of a conflict.

There must be a conflict between the requirements of the Acts before an exclusionary provision would apply. Ontario Order PO-2092-F affirmed Order P-344 where the Commissioner considered the federal legislative paramountcy and reached the conclusion:

> *"The case law appears to establish that "express contradiction" includes both an express conflict in wording of a federal and provincial statute, as well as a conflict in the operation of the two legislative schemes in a way which interferes with the functioning of the federal scheme."* (emphasis added)

Following Alberta Orders,[18] a two part analysis examines the following questions:

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[18] Inter alia, BC Order 04-01, AB Order 2001-005, AB 2001-036, AB Order 99-034 at para 38:
Para 40: In determining whether section 5(2) is engaged, it is necessary to find a provision of the FOIP Act and a provision of the enactment that is inconsistent or in conflict.
Para 48: Therefore, for section 5(2) to be engaged in this case, two criteria must be met: 1) the information withheld must fall within a provision of a statute (or its regulations) listed in section 15(2) of the FOIP Regulation; and 2) there must be an inconsistency or a conflict between a provision of the FOIP Act and the provision of the statute (or its regulations), in relation to the information withheld.

1. Is information requested under the control of a government department and within the ambit of s. 171 of the WCA?
2. If yes, is a provision of the FOIP Act inconsistent or in conflict with s. 171 of WCA?

If we assume the information is within the ambit of s. 171 of the WCA, we would next analyze whether there is an inconsistency or conflict between the FOIP Act and WCA requirements. If there is a conflict or inconsistency, the WCA prevails and the OIPC would have no jurisdiction with respect to the access request. For example, conflict with the FOIP Act requirements may exist in determining an employer's right to access employee information during the appeal process under the WCA. Then, the WCA would prevail and the FOIP Act provisions would not apply. However, disclosure of the employee's information should be limited to that necessary for the employer to know the case to be made for the appeal. In the case of an employee accessing his own case management file, we see no conflict with the provisions of the FOIP Act and maintain that the WCB should be held to the higher standard of the FOIP Act.

(2) Is one law supplemental to the other?

While the FOIP Act is considered by the courts to carry quasi-constitutional status, it could be argued that the provisions of the FOIP Act "supplement" the right of the injured worker under the WCA. Although the FOIP Act codifies a higher standard, it does not conflict with the requirements under the WCA. Black's Law Dictionary defines "supplemental" as "that which is added to a thing or act to complete it." In a very real way, the FOIP Act supplements the WCA to elevate the access and privacy rights within the WCA to those to which an ordinary individual would anticipate and expect.

(3) Is there duplication without actual conflict or contradiction?

Current case law indicates that even where the one legislation is clearly paramount, unless there is "express conflict," both Acts can apply concurrently and the individual is held to the higher standard. This follows through in a provincial legislation paramountcy analysis of the application of the FOIP Act and the WCA. If section 171 does not conflict with the provisions of the FOIP Act, both can apply concurrently. Section 171 of the WCA could arguably be a more general statement of the principles encoded and defined in the FOIP Act. Neither the FOIP Act nor WCA explicitly negate the injured worker's common law fiduciary rights. Therefore, WCB should be held to the higher standard as encoded in the FOIP Act.

COMMON LAW:

A brief review of the application of natural justice and fiduciary duties at common law support our position with regards to the interaction of the FOIP Act and WCA.

Natural Justice:

The rules of natural justice provide a framework to ensure that relationships with inherent imbalances of power are not misused. Of particular note to Saskatchewan's situation is a case out of British Columbia

wherein identical provisions were analyzed by the courts. The headnote of *Re: Napoli and Workers' Compensation Board*[19], summarizes the courts position as follows:

> *"Section 95 of the Workers' Compensation Act, R.S.B.C. 1979, c. 437, which prohibits persons authorized to make inquiries from divulging information in a claimant's file "except in the performance of their duties", does not authorize a board of review to refuse a claimant access to the medical files relied on by a disability awards officer in deciding his claim. The board of review has a duty to conduct a hearing in compliance with the rules of natural justice and, therefore, must show the worker the content of his file in order to give him a fair opportunity to correct or contradict its contents. Similarly, the commissioners, on appeal from a board of review, are bound by the rules of natural justice, and they must reveal confidential medical information received from the Workers' Compensation Board. Summaries of the medical file do not constitute adequate disclosure."*

This wording is identical to s. 171 of the Saskatchewan WCA. In this case, the courts held:

> *"To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument. Per Dickson J. in Kane v. Board of Governors of University of British Columbia(1980), 110 D.L.R. (3d 311 at pp. 322-4, [1980] 1 S.C.R. 1105, 18 B.C.L.R. 124 at pp. 135-6 (S.C.C.)*
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> ...
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> *With respect, these [policies] do not amount to any kind of legal authority binding on a Court of law. It is sufficient to say that the debate about whether or not evidence should be kept secret in a judicial or quasi-judicial inquiry was settled years ago by the common law. It quite wisely came out against the concept of secrecy and in favour of disclosure. Openness is the rule and secrecy the exception. My task is to ascertain whether or not this principle of law has been modified by the Legislature in any of the sections of the Workers Compensation Act.*
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> ...
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> *Apparently the W.C.B. is prepared to let everyone else involved in these proceedings examine the petitioner's file except the petitioner himself. The compensation consultant has seen it, the board of review has seen it, the commissioners have seen it, counsel for the W.C.B. has seen it, and now it has been offered to me. But the W.C.B. says, under no condition is the petitioner to have a look at it. And yet, he is the subject of its contents."* [at p. 321]

The Courts examined s. 95, which parallels s. 171 of the Saskatchewan WCA, and determined:

> *"One of the duties of a board of review is conduct a hearing in compliance with the rules of natural justice. Therefore, it seems to me that in the performance of this duty it must show to the worker the contents of the file delivered to it by the W.C.B. To do otherwise would deny the worker "a fair opportunity to correct or contradict" what is in the file and it would amount to hearing one side (the W.C.B.) in the absence of the other (the worker). It follows that s. 95 does not allow a board of review to keep confidential material given to it by the W.C.B.*
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> *This section does not "expressly or by necessary implication" destroy the rule of openness.*
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> ...
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> *The W.C.B. has no legislative authority to establish a practice of non-disclosure at a quasi-judicial inquiry such as a hearing before a board of review."* [at p. 321-2]

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[19] 121 D.L.R. (3d) 301

The courts have held that the rules of natural justice have not been sufficiently nullified expressly or by necessary implication in the wording of the Saskatchewan WCA provision. The duties under the FOIP Act, including s. 27 (ensure info is accurate and complete); s. 31 (individual entitled to own personal information in government record); s. 32 (right of correction), all support the rules of natural justice which the courts have held continue to apply to WCB in BC. While this analysis deals with appeals, the logic also applies to decisions being made at the case management adjudicator level.

The Office of the Information and Privacy Commissioner for British Columbia investigated the practices of the BC WCB with respect to disclosing personal information about injured workers to employers in Investigation Report P96-006. This is a historical perspective of the development of BC's WCB access procedures post Napoli. The BC WCB took the position that natural justice demanded disclosure of the entire claim file to the employer. In fact, the Commissioner found that WCB had moved to the following position post Napoli:

> *"The WCB responded to Napoli in Decision No. 338, which granted disclosure to the worker and/or the employer only after either the worker or the employer had launched an appeal. Workers were entitled to **full** disclosure of the claim file, while employers were provided with copies of the documents that the WCB considered to be relevant to the issue at appeal.*
> ...
> *In 1987 the Ombudsman of British Columbia published the Compensation System Study Public Report No. 7, which concerned "fairness to individual workers and employers affected by the administration of workers' compensation in British Columbia."*
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> *One of the Ombudsman's primary concerns was the fact that workers were not permitted access to their files until an appealable decision had been made. The WCB justified this practice on the grounds that "allowing disclosure at any time would unduly hamper the activities of the Board's departments in their routine administration." The Ombudsman recommended that workers be given access to their files at any point in time, stating:*
>
> > *Reasonable access on request would have some important benefits for the W.C.B. and claimants. Secrecy breeds suspicion and a lack of confidence in the system. Reasonable access on request would counteract this. There would also be an increased accountability of the W.C.B. to its claimants and an increased understanding by claimants; it would provide positive public relations for the W.C.B. as it would be in the vanguard promoting greater access to information for individuals; and it would contribute toward improved adjudication... Administrative difficulty is an inadequate reason for the W.C.B. to restrict full access to information which concerns an individual's health and income... The W.C.B. has the discretion under the Act to provide disclosure of claim files to workers upon request, and there is no adequate reason not to do so. If disclosure would interfere with or delay a decision on the claim, the worker could be informed of this and thus have the option of deciding whether disclosure was worth the inconvenience."*

The BC WCB then decided to eliminate the distinction between claimants and employers with respect to disclosure.[20] The BC Information and Privacy Commissioner considered the WCB's position and found:

> *"Were I to accept the WCB's argument that both workers and employers are "parties to a proceeding" from the moment the first decision is made on a claim, the entire workers'*

[20] BC WCB Decision No. 410

compensation system would be essentially exempt from the privacy protections set out in Part 3 of the Act. That was clearly not the intent of the Legislature.

It is my view that the practice of disclosing a worker's entire file to an employer prior to the launching of an appeal exceeds the requirements of natural justice and is a breach of the Freedom of Information and Protection of Privacy Act.

...

Once an appeal has been filed with one of the WCB's appellate bodies, section 3(2) of the Act applies, and the WCB has the authority to design its own policy on disclosure, which the courts oversee. Thus, if the WCB (including Medical Review panels and the Appeal Division) and the Review Board decide they must disclose an entire file at that point, I have no jurisdiction to review this decision. If the appellate bodies choose to disclose more information than the worker believes is necessary, that decision or policy could be challenged through a judicial review. Before an appeal is filed, however, I am of the considered opinion that the FOIPPA Act fully applies to the WCB's disclosure policies."

This fully supports our position with regard to s 171.1 and 171.2 of the Saskatchewan WCA. Much of the same language as exists in Saskatchewan's WCA continues to be utilized in BC's WCA. Further the logic behind the analysis provided here applies to our jurisdiction with regard to application of the FOIP Act and WCA.

From the inquiries and complaints received in our office, it seems the Saskatchewan WCB is of the same opinion as that of the BC WCB prior to the review by their Information and Privacy Commissioner. We believe that the BC WCB's current practices are more compliant with both the FOIP Act requirements and the requirements of the common law.

Fiduciary Duties:

The common law has determined that fiduciary duties attach to the physician/patient relationship and to the collection, use, disclosure and retention of personal health information as the nature of such information is extremely sensitive. The physician/patient fiduciary duty as defined by the courts can be readily analogized to apply to an injured worker and the WCB and should be taken into account in implementing appropriate access and disclosure policies and practices.

A leading authority on health care fiduciary duties at common law is *McInerney v. MacDonald*.[21] Justice La Forest confirmed the fiduciary relationship between a physician and a patient. He then considered the patient's right of access to his own medical records in the possession of the physician. He stated:

"... a patient has a right to be advised about the information concerning his or her health in the physician's medical record. In my view, however, the fiducial qualities of the relationship extend the physician's duty beyond this to include the obligation to grant access to the information the doctor uses in administering treatment."

An analogy is readily made to WCB collecting personal health information for the purpose of providing benefits and the corresponding fiduciary relationship imposing a duty to grant access to the information upon which benefit entitlement decision are or could be made. In fact, LaForest, J. found,

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[21] [1992] 2 S.C.R. 138, 1992 CanLII 57 (S.C.C.)

> *"[Disclosure] serves to reinforce the faith of the individual in his or her treatment. ... In my view, the trust posed in the physician by the patient mandates that the flow of information operate both ways."*

A reasonable individual would feel more comfortable that WCB was making sound decisions if the injured worker had access to his complete case file to ensure the decisions are being made on accurate and complete information. The injured worker has exchanged his right to personal privacy for entitlement to WCB benefits. However, access to the medical information upon which the benefit entitlement is decided should be "met with a corresponding openness and full disclosure."[22] LaForest concedes that the right of access is not absolute. However, he places the onus on the doctor to justify an exception to the general rule of access. Justice La Forest's position directly translates to impose a fiduciary relationship on WCB with regards to the injured worker and juxtaposes nicely with the FOIP Act and HIPA in intent and implementation. Labour relations arbitration decisions in respect of occupational health and safety issues also follow this line of reasoning.[23]

WCB accepts that the FOIP Act applies to general, administrative records in their organization, but treats case management files differently by restricting access to personal information and personal health information. While protecting the privacy of the injured workers is appropriate, the information does not need to be protected from the worker to whom the information relates without sufficient, specific reason in individual cases. WCB seems to misunderstand the application of the right to access your own personal information portion of the FOIP Act and has imposed a blanket policy to deny injured workers access to their personal information in the hands of a government department, namely WCB; without sufficient reason or individual consideration of the specific circumstances in each case.

The WCA was not intended to abrogate the common law fiduciary right of access to medical information which is further supported and encoded in the legislation of the FOIP Act and HIPA and is, in fact, an affirmation of the rights set out in the FOIP Act and HIPA. In the instance of WCB, the interest of the individual in his medical information exceeds a personal interest to reflect an additional monetary interest. Section 171 is a general confidentiality statement which could easily encompass the procedures set out in the FOIP Act. Compliance with the FOIP Act, section 5 (Right of Access) and Part IV (Protection of Privacy) Provisions (24 to 32), especially sections 31 (Individual's access to

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[22] Justice LaForest in *McInerney v. MacDonald*, quoting: B. Knopper, "Confidentiality and Accessibility of Medical Information: A Comparative Analysis" (1982), 12 R.D.U.S. 395, at p. 431.

[23] North York General Hospital and Ontario Nurses Association: ... The trust-like "beneficial interest" of the patient in the information indicates that, as a general rule, he or she should have a right of access to the information and that the physician should have a corresponding obligation to provide it. The patient's interest being in the information, it follows that the interest continues when that information is conveyed to another doctor who then becomes subject to the duty to afford the patient access to that information.

...

While the relationship between an employee and the health care professionals in the Occupational Health department is not identical to that of patient and physician, the relationships share significant common features. ... Having regard to the Supreme Court's analysis in *McInerney*, it is difficult to see why these features, combined with the employee's fundamental interest in her own health information, should not result in a fiduciary duty to afford her access to and copies of not only the records of any treatment they may have provided to her (of which there may have been none in this case), but also records of treatment and other health information about her that they obtain from the employee or others.

...

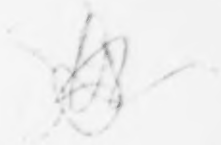
Bearing in mind the treating physician's obligation to provide copies to the patient, as established in *McInerney*, it is difficult to imagine what legitimate interest of the employer's is served by making copies available only to a treating physician or a treating agency and not directly to the employee..."

personal information) and 32 (Right of correction) will not involve breach of the confidentiality requirements of the WCA. In fact, these provisions reinforce WCB's common law fiduciary obligations.

CONCLUSION

We appreciate the opportunity to discuss our concerns with the Review Committee and your consideration of our recommendations.

All of which is respectfully submitted,



Gary Dickson
Saskatchewan Information and Privacy Commissioner

October 24, 2006